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Supreme Court, U.S.
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No. 04-1044

In The

Supreme Court of the United States

PROVIDENCE HEALTH CARE PLAN,
an Oregon non-profit corporation,

Cross-Petitioner,

v.

GARY McDOWELL and ROSELEA McDOWELL,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

GORDON T. CAREY, JR.
Counsel of Record
721 SW Oak Street, Second Floor
Portland, OR 97205
503 222-1415

Attorney for Cross-Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

RESPONSE TO CROSS-PETITIONER'S STATEMENT OF THE CASE (AND SUMMARY OF FACTS) 1

RESPONSE TO CROSS-PETITIONER'S REASONS FOR GRANTING THE CONDITIONAL WRIT 3

Introduction 3

1. Cross-Petitioner Has No Claim Under ERISA 4

2. Cross-Petitioner Is Barred By Claim Preclusion from Asserting a Claim for Reimbursement a Second Time 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Bast v. Prudential Ins. Co., 150 F3d 1003 (9th Cir 1988) 5

Great-West Life and Annuity Co. v. Knudson, 534 US 204, 122 S Ct 708, 151 L Ed 2d 635 (2002) 4, 5

Metropolitan Life Ins. Co. v. Taylor, 481 US 58, 107 S Ct 1542, 95 L Ed 2d 55 (1987) 5

Pilot Life Ins. Co. v. Dedeaux, 418 US 41, 107 S Ct 1549, 95 L Ed 2d 39 (1987) 3, 5

Sanson v. General Motors Corp., 966 F2d 618 (11th Cir 1992) 3

Stewart v. US Bancorp, 297 F3d 953 (9th Cir 2002) 7, 8

STATUTES

29 USC §1132 ..... 2, 5, 7

RULES

Fed. R. Civ. P. 12 3

S. C. Rule 10 4

S. C. Rule 14 3

RESPONSE TO CROSS-PETITIONER'S STATEMENT OF THE CASE (AND SUMMARY OF FACTS)

Cross-Petitioner Providence (hereinafter, "cross-petitioner") asserts in the cross-petition, page three, that it has an "undisputable" contractual right to reimbursement. Cross-petitioner characterizes this right as one under its health care services contract. Cross-petitioner avoids using the term ERISA plan, but that is exactly what the health care services contract is. The health care services contract upon which cross-petitioner relies (the actual document is named a "Master Group Contract") is defined as a "plan." Master Group Contract, Exhibit 2 to Complaint in **McDowell II**, USDC Case No. 02-6110, CR:1, p. 7, paragraph 1.41, p. 54, paragraph 15.22.[1] Cross-petitioner also alleged in its complaint that the contract was an ERISA plan. Complaint in **McDowell II**, USDC Case No. 02-6110, p. 2, paragraph 5, App:H-2. Defendants McDowell in the trial court below (hereinafter, "the McDowells") never signed an application requesting coverage from cross-petitioner, never signed an enrollment form, never signed the Master Group Contract, and never agreed to the terms of cross-petitioner's plan, and particularly the reimbursement provision relied upon by cross-petitioner.[2] Mr. McDowell obtained health care coverage through his

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[1] Indeed, cross-petitioner's name, **Providence Health Plan**, suggests that its contractual commitments are covered by ERISA.

[2] In its cross-petition, page four, cross-petitioner contends that the McDowells applied for health coverage with cross-petitioner's "predecessor-in-interest by merger," SelectCare Health Plans. There is no evidence in the trial court record (other than counsel for cross-petitioner's assertion) that SelectCare Health Plans was cross-petitioner's predecessor-in-interest by merger.

employer. After SelectCare provided coverage, in 2000, cross-petitioner unilaterally issued its own plan and provided coverage for one year, after which Mr. McDowell's employer terminated Providence. Affidavit of Gary McDowell, p. 2, in **McDowell II**, USDC Case No. 02-6110, CR:16.

Cross-petitioner asserts at page four that the McDowell signed, and the undersigned counsel accepted, a "trust agreement," agreeing to reimburse cross-petitioner for medical expenses paid. Cross-petitioner was obligated under its plan to pay the McDowells' medical expenses. *See*, Master Group Contract, Exhibit 2 to Complaint in **McDowell II**, USDC Case No. 02-6110, CR:1, pp. 23-39. Contrary to cross-petitioner's obligation under the plan, it refused to pay for the McDowells' medical expenses unless and until they signed the "trust agreement." When the McDowells' medical providers demanded payment, the McDowells signed the trust agreement so that their medical bills would be paid. The McDowells signed the document under protest. Affidavit of Mr. McDowell, p. 2, in **McDowell II**, USDC Case No. 02-6110, CR:16. Cross-petitioner provided no consideration in return for execution of the trust agreement. Magistrate Judge Jelderks in **McDowell I** held that the trust agreement lacked consideration. **McDowell I** Opinion, App:E-3-4, footnote 1. Cross-petitioner did not assign error in the Ninth Circuit to the district court's finding.

In its cross-petition, page six, cross-petitioner asserts that "under the federal common law of equity, cross-petitioner was entitled to specific performance of those contracts as other 'appropriate equitable relief' under 29 USC §1132(a)(3)." Cross-petitioner is mistaken. The courts have held that they will not create a common law remedy

when ERISA does not authorize one. See, e.g., *Sanson v. General Motors Corp.*, 966 F2d 618, 621-622 (11th Cir 1992) (action by retiree against former employer in which retiree contended he was defrauded of pension benefits). Relying on *Pilot Life Ins. Co. v. Dedeaux*, 418 US 41, 107 S Ct 1549, 95 L Ed 2d 39 (1987), *Sanson* noted that this Court had previously considered and rejected such an extension of remedies. 966 F2d at 622.

In its cross-petition, page seven, cross-petitioner contends the district court determined that it had no "equitable jurisdiction under ERISA over cross-petitioner's claim for specific performance." Magistrate Judge Coffin did not so hold. Rather, Magistrate Judge Coffin determined that cross-petitioner could prove no set of facts in support of a claim entitling it to relief under ERISA, and that the complaint should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b). **McDowell II** Opinion, App:F-2. Magistrate Judge Coffin concluded that even though cross-petitioner asserted a claim "in equity" under ERISA, in reality cross-petitioner sought monetary damages, and could not make such a claim under ERISA. **McDowell II** Opinion, App:F-7.

RESPONSE TO CROSS-PETITIONER'S REASONS FOR GRANTING THE CONDITIONAL WRIT

Introduction

S. C. Rule 14(h) directs that all petitions for certiorari must contain:

> "A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10."

Rule 10 suggests three bases for seeking certiorari, two of which may apply to a decision of federal circuit court of appeal. Rule 10(a) and Rule 10(c). Cross-petitioner does not offer any rationale under Rule 10(a) or 10(c) why this court should grant its cross-petition. Rather, cross-petitioner suggests that if this Court grants the McDowells' petition for certiorari in **McDowell I**, (Supreme Court Docket No. 04-883), then this Court should also grant Providence's cross-petition in **McDowell II,** so that this court has "the full panoply of issues before it." Cross-Petition, p. 9. That is not a reason for granting a petition for certiorari. Indeed, there is no reason for granting the cross-petition because **McDowell II** was correctly decided on at least two grounds.

1. Cross-Petitioner Has No Claim Under ERISA

First, cross-petitioner has no claim for specific performance under ERISA. In **McDowell II**, cross-petitioner brought an action for an injunction requiring specific performance of the McDowells' alleged obligation to reimburse cross-petitioner. Complaint in **McDowell II**, pp. 4-5; App:H-3-6. Magistrate Judge Coffin referred to cross-petitioner's second action as "lawyerly inventiveness." **McDowell II** Opinion, p. 3; App:F-3. The trial court dismissed cross-petitioner's claim for equitable relief based on this Court's decision in *Great-West Life and Annuity Co. v. Knudson*, 534 US 204, 122 S Ct 708, 151 L Ed 2d 635 (2002), because cross-petitioner sought to impose personal liability on the McDowells. App:F-3-7.

Cross-petitioner frames the question for review in this case as: "... if a healthcare services contractor lacks an adequate remedy at law to enforce the terms of a healthcare

services contract, does [ERISA] provide an equitable remedy pursuant to 29 USC §1132?" Cross-Petition, p. i. See, also, Cross-Petition, p. 3. Cross-petitioner ignores the fact that ERISA also deprives participants and beneficiaries of many traditional state law claims. *See, e.g., Pilot Life Ins. Co. v. Dedeaux, supra* at 57 (depriving participant of state common law tort and contract claims asserting improper processing of a claim for benefits); *Metropolitan Life Ins. Co. v. Taylor*, 481 US 58, 67, 107 S Ct 1542, 95 L Ed 2d 55 (1987) (depriving participant of state common law contract and tort claims). Sometimes ERISA leaves the parties without remedy. *See, e.g., Bast v. Prudential Ins. Co.*, 150 F3d 1003, 1011 (9th Cir 1988) (holding that a participant's state law tort and contract claims against the plan administrator were preempted by ERISA, even though preemption left the survivors of the participant without a remedy).

Ultimately, it is to Congress that cross-petitioner should direct its complaint. This Court has said in *Great-West* in response to this very argument:

> It is, however, not our job to find reasons for what Congress has plainly done; it **is** our job to avoid rendering what Congress has plainly done [here, limit the available relief] devoid of reason and effect. 534 US at 217-218.

The Ninth Circuit panel agreed with Magistrate Judge Coffin:

> The district court was correct in concluding that Providence's claim lay outside the scope of Section 1132(a)(3). While Providence terms this an action in equity for specific performance, at bottom, Providence is simply attempting to enforce the contractual obligation for repayment. This is

> a "classic action at law and not an equitable claim." Ninth Circuit Opinion, App:A-11.[3]

The panel correctly concluded that this court in *Great-West* had confirmed that the damages cross-petitioner Providence sought were "unobtainable under ERISA's enforcement provision." Ninth Circuit Opinion, App:A-12:

> " . . . *Great-West* squarely resolves that Providence's claim for monetary damages against the McDowells is a claim for a legal remedy, despite Providence's attempt to disguise its claim as equitable." Ninth Circuit Opinion, App:A-12.

Further, cross-petitioner did have adequate remedies at law, but chose not to pursue them. Cross-petitioner could have pursued a subrogation action against the third-party tortfeasors, or sought reimbursement directly from the tortfeasors' liability insurance carrier, or intervened in the McDowells' Washington state action against the tortfeasors, but chose not to pursue any of those options. None of those alternatives would have involved an action between an ERISA fiduciary and an ERISA beneficiary or participant. *Great-West* did not preclude such actions.

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[3] It is difficult to square this language, and the Ninth Circuit panel's conclusion in **McDowell II**, with the same panel's conclusion in **McDowell I**. If cross-petitioner's action in **McDowell II** to enforce the "contractual obligation for repayment" is impermissible under ERISA, how could the state law claim for contractual repayment not be completely preempted?

2. Cross-Petitioner Is Barred By Claim Preclusion from Asserting a Claim for Reimbursement a Second Time

Second, cross-petitioner could not split its asserted claims, whatever they might be. In **McDowell I**, cross-petitioner filed an action in state court against the McDowells alleging breach of the plan contract under state law. Complaint in **McDowell I**, USDC 01-1704, App:G-1-6. The McDowells removed the case to federal court, and Magistrate Judge Jelderks dismissed cross-petitioner's complaint with prejudice. Cross-petitioner did not in **McDowell I** join a claim for equitable relief under 29 USC §1132(a) with its state law claim (although it could have). After the district court dismissed cross-petitioner's complaint in **McDowell I**, cross-petitioner then filed a second action in federal court seeking equitable relief under 29 USC §1132(a). The equitable relief cross-petitioner sought in **McDowell II** arose out of the same transaction and facts as those at issue in **McDowell I**. Cross-petitioner split its claims, filing the legal claim first and the equitable claim thereafter. **McDowell II** should have been dismissed because Providence split its claim for relief. *Stewart v. US Bancorp*, 297 F3d 953, 959 (9th Cir 2002) (holding that plaintiffs who originally brought state law claims in state court for recovery of benefits were barred by the doctrine of claim preclusion from later bringing claims for the same benefits under ERISA in federal court).

The Ninth Circuit panel agreed. Relying on its opinion in *Stewart v. US Bancorp.*, *supra*, the panel held that claim preclusion applies if there is (1) an identity of claims; (2) a final judgment on the merits; and (3) identity

or privity between parties. Ninth Circuit Opinion, App:A-10. The panel then stated:

> All three requirements are met here. First, the two actions clearly involved the same parties disputing the same contractual provision. Additionally, a finding of preemption is a final judgment on the merits. [*Stewart v. US Bancorp*.], at 956-57 (holding that the plaintiffs' ERISA claims should have been brought in the previous state court litigation that was removed and dismissed for preemption, rather than in a subsequent federal proceeding).
>
> Accordingly, this action is barred under claim preclusion. Ninth Circuit Opinion, App: A10-11.

CONCLUSION

The decision by the Ninth Circuit panel in **McDowell II** was correct, and cross-petitioner has offered no reason why this court should grant certiorari and review that decision.

Respectfully submitted,

GORDON T. CAREY, JR.,
OSB No. 77133
Attorney for Cross-Respondents